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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 41.

THE CITY OF SAN JUAN, PLAINTIFF IN ERROR,

vs.

THE ST. JOHN'S GAS COMPANY, LIMITED.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF PORTO RICO.

BRIEF FOR THE DEFENDANT IN ERROR.

FRANCIS M. DRAKE,
RUSSELL D. McKINNEY,
JOHN SHELDON HILLARD,
Attorneys for the Defendant in Error.

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STATEMENT.

This action was brought by the St. John's Gas Company, Limited, a corporation under the laws of Great Britain and Ireland, against the municipality of the city of San Juan (exactly, San Juan Bautesta de Puerto Rico), a municipal corporation under the municipal and provincial laws in force in Puerto Rico prior to December 31, 1896, to recover a balance of $12,601.39, with interest thereon, alleged to be

due to the former under a certain contract with the latter for lighting the streets and public buildings with gas.

The contract sued upon was effected August 21, 1875, after several months of prior advertisement and negotiations. It was executed in the "loyal city of St. John's Baptist of Porto Rico," later more shortly called San Juan.

The contractor or concessionaire was one Julio E. Steinacher, who was represented at and in the execution of the contract by one Joseph Nadal y Rey, his general and special attorney for such act (13). The contract covered a period of "twenty-five (25) years from the day that it will take place" (19) and expired by the terms of the limitation so expressed September 16, 1900.

The plaintiff's demand covered the period from November 30, 1899, to September 16, 1900, the date of expiration of the contract (2, 3), and did not comprehend any moneys which may have accrued due prior to said first-mentioned date (40).

It appears from the recitals of the "public instrument," which, besides the express terms of the contract proper, sets forth the antecedent negotiations between the parties, that the city of San Juan owned and possessed certain municipal gas-works, together with the necessary buildings and a considerable supply of gas-making materials, and, "not doubting that the service (of public lighting) would be done with more advantage when the gas-works belonged to a private individual, who would always have them in a perfect state of order" (14), the municipality, acting by its duly constituted authorities, had determined "to put up to public tender the service of the public lighting

of this city, including the district of the 'Marina'" (13), and to "sell the gas-works and all that constitutes the establishment of the gas-works, 'to-day entirely useless'" (14). By the "Conditions of the Corporation" set forth in the advertisement for proposals it was made "an indispensable condition" that bidders for the lighting should also bid for the purchase of the gas-works buildings, machinery, pipes, and materials referred to (17, 18), and it was further provided that the contractor for the lighting should, in fact, become the purchaser of such plant (19). The advertisement also announced that it was to be "well understood, also, that the sum fixed for the public lights will be of three dollars in currency (monthly) for each lamp in the city, including the district 'de la Marina,'" * * * "and that the value of the said buildings, apparatus, &c., according to the appraisement made by the municipal architect" * * * "amounts to $31,741.83, currency" (17, 18).

Article 8 of the "Conditions" informed intending bidders that (as translated, p. 20) "The payment to the contractor will be made in the circulating foreign money in commerce for the value that is received without any premium that will equalize it to the Spanish official current money."

The contractor, Steinacher, first proposed to undertake "the service of the lighting for the sum of $3 monthly in currency" (16), and to purchase the gas-works buildings, materials, &c., "for the sum of $22,000 currency" (17). This offer was rejected, and, the "conditions" having been somewhat modified in matters not important here, after further advertisement Steinacher again proposed "to take the gas-

works" and pay therefor "the sum of thirty-one thousand seven hundred and forty-one dollars [and] eighty-two cents in currency and take under his charge the public lights for the sum of three dollars monthly in currency for each lamp" (29). This proposition was accepted by the municipal authorities (31), and the contract proper, which appears at pages 35 to 38 of the Record, was signed by the parties.

By article 2 the contractor bound himself "to supply daily to this city and the district of 'La Marina' the lights with hydrogen gas" * * * "for the sum of three dollars as already stipulated," and by article 5 "to pay to the excellent corporation of this city $31,741.80 in foreign commercial currency" for the gas-works loose material, such payment to be made in "5th parts after the 1st year that the works have been in working order and successively until the whole sum is paid" (36).

By article 7 it was provided that the contractor, Steinacher, might sell the said gas-works "and transfer the present contract" by giving notice to the corporation and continuing in force certain mortgage guarantees provided for by the proposals and contract (36, 37).

By paragraphs second and third of the "Conditions" the contractor was required, within fifteen days "after the approval of the (his) tender being notified," to produce a "definitive guarantee" of $6,000 in cash or $9,000 on a house of this city, 1st mortgage, to the satisfaction of the municipality" (19). In fulfillment of this provision Steinacher offered a first mortgage on two houses which, with the ground on which they stood, were appraised by the municipal architect "at thirty thousand pesetas or six thousand dollars," and "twenty thousand pesetas or four thousand dollars in

currency," respectively (32). On re-appraisal the houses, without the grounds, were appraised, respectively, at "26,000 pesetas or $5,200," and "19,000 pesetas or $3,800 in currency" (34).

The contractor, Steinacher, having taken possession of the gas-works, buildings, &c., purchased as above indicated, entered upon the performance of the contract to light the streets and public buildings of the city of San Juan, and continued in the performance of the same until "about 1878," when he transferred the contract to the defendant in error, the plaintiff below, which continued its performance until the end of the contract period (R., 39).

Of the total $14,600.66 claimed to be due under plaintiff's bill of particulars the sum of $1,999.27 was for interest to September 16, 1901, and $115 was the alleged value of certain lime, coke, coal, and gas seized by the city (3).

No evidence was introduced tending to prove the latter item, and the jury was instructed by the trial court to disregard it (55).

The defendant pleaded *non-assumpsit*, *nil debet*, and set-off "in an amount equal to the plaintiff's claim, for defaults committed by the plaintiff in its contract to furnish lights to the defendant" (4).

No testimony was introduced tending to show that any fines or delinquencies had been assessed against the plaintiff for failure to fulfill the obligations of the contract, and the court instructed the jury that it could "find nothing on that account" (54).

Defendant also filed an additional plea to the effect that plaintiff had assigned to the firm of Mullenhoff & Korber the sum of $5,196.88 of the total of said claim, "and that after the last pleading in this action, to wit: on or about the 19th of March 1902 the defendant canceled and discharged said claim as to said amount by payment of the same to said firm" (6).

On the trial it was conceded that said sum of $5,196.88 had been paid by the defendant to said firm (39, 40, 42), and the jury was instructed by the court to deduct such sum from the amount claimed, "provided of course you find anything for the plaintiff" (51).

The plaintiff offered in evidence the written contract above referred to and it was admitted without objection (12), as was also evidence tending to prove performance of its obligations "up to the morning of the 16th of September" (1900) (12). Plaintiff's witness Scott testified that he assumed "the management of the company here in San Juan about the year 1890; since that time I have collected from the city all the moneys that the city has paid" (40). The city "never paid what was due; they always paid in Mexican money or pesos, and under verbal protest from me." I accepted such payments because "I could not get anything else;" from November, 1899, to August, 1900, he received small sums on account (40) which were paid in American gold (41). In response to the question, "In what kind of money did you receive the several payments made by the city?" witness replied, "In American money" (42).

Plaintiff also gave evidence tending to prove that in the year 1875 the foreign money or currency current in Porto

Rico was "American silver and American gold and old Spanish gold and some Mexican and Colombian gold." The American gold was at 5 per cent. premium; the Spanish doubloon was at 6¼ per cent. premium; the Mexican, Colombian, Venezuelan, Peruvian, and Chilean doubloons, actually worth $16, were rated at $16.50, and the Spanish ysabelinas were at 5 per cent. (42–43). The value of the American double eagle was rated in "American silver, because nearly all of the Spanish silver had been taken away from here." "The most of the money in circulation here then was American silver and American gold and old Spanish doubloons." "The American silver was at par." In paying dues at the custom-house "you had to pay them in real Spanish coin, and, as it would not suit to give Spanish gold and you could not give Spanish silver, it was agreed between the treasurer and the merchants at large here in the island to receive dues in American silver, giving .526 per cent. premium on the Spanish silver, although you could not get the Spanish silver" (43).

On cross-examination the court refused to permit the witness to say how long the above moneys continued to be circulating mediums in the island or what money was current in the island in 1890 or between 1890 and 1899, to which rulings defendant duly excepted (43, 44).

The defendant offered evidence tending to prove that during the year 1900 and "previous to the change of the money Mr. Scott received no other than provincial money," nor did he "ever make any objection to the receipt of the provincial money" (44); that at the time of the assignment to Mullenhoff & Korber a written agreement had been signed by Scott, which amounted to an account stated, and said paper-

writing was put in evidence (45). It recites a balance of 7,228 pesos and eighty cents, "equivalent of $4,337.32 in favor of the firm of Mullenhoff & Korber, being therefore the municipal corporation relieved from any compromise with Mr. Scott concerning the said amount, without any prejudice to the resolutions to be passed some time in the future about the claims previously filed by the said contractor" (45).

In rebuttal the witness Scott, referring to said instrument, testified: "The arrangement was that they were to pay to Mr. Korber all they could pay to the end of June, and afterwards reclamations [were] to be made by me if the accounts were not correct;" "the clause in that document which says 'without any prejudice,' etc., etc., refers to my reclamations as to the account between the city and the company without reference to Mullenhoff & Korber;" "these claims or reclamations which I was to make referred to the monthly accounts for gas lights; the claims were for arbitrary fines by the city" (50). "As the city never supplied any statement of accounts to me, I could not state that I was satisfied with them; this document was simply an agreement to pay Mr. Korber so much money, subject to my reclamations thereafter" (51).

The bill of exceptions contains all the evidence given in said cause (51).

Both sides having rested, the court, in so far as the controversy before this court is concerned, instructed the jury,

Frst, "The main question in the case, if you find there is anything owing, is in what character of money you are to estimate it."

"In the proposal which was made by Mr. Steinacher it was stated that, so far as the lighting was concerned, he would do it for $3.00 per lamp monthly in currency. Now, currency means what was passing as money in the country; what was current as money in the country. * * * It is stated in the contract in one place that payment was to be made to the contractor in circulating foreign money in commerce. * * * The gas-works were sold, as the contract shows, for a certain sum of money, thirty thousand dollars, payable in foreign commercial money. * * * So far as the construction of that contract is concerned, you must accept the law as given you by the court. You have no right to construe the contract yourselves and determine what it means—that is a matter for the court to do. If the parties specifically contracted for a certain kind of money then the contract is payable in that kind of money. Parties must be considered as contracting with reference to the existing law where the contract is made, or the state of affairs existing by the then law. The fact that the law may be changed so as to make the performane of the contract more burdensome or expensive does not change or discharge the contract. * * * I tell you, as a matter of law, that under that contract the payment for lighting was to be made in the money that was then current and in circulation in the island or Porto Rico. That was what was meant by 'current foreign money' when the term was used in that contract. That was what was meant by the term 'current money' in that contract, or even by the term 'currency' in that contract" (52). * * * "The parties making that contract took into consideration the value of money in the island at that time, and the money that was then circulating in the island. You are to determine what that was from the testimony. * * * There is no showing, as far as I recollect, that pesos, as they are termed, or Porto Rican money, was circulating in Porto Rico then. * * * Therefore, I say to you that under this contract these payments for these lights were to be made in American gold or silver, or in Spanish, Mexican, Colombian, Peruvian, Chilean and Venezuelan gold.

"Now, the party could discharge it in any one of these mediums of exchange, and the testimony is before you as to what that money was worth" (53).

Second. * * * "if the one had paid and the other

without objection had accepted through a course of years money of a certain kind and meant as payment of what was owing on this contract from time to time, then you may find that the parties had changed the kind of money with which the contract might be discharged, and if this was in Porto Rican pesos, then the plaintiff would be only entitled to recover in American dollars at the rate of sixty cents on the American dollar, whatever amount you may believe from the evidence he is entitled to recover in Porto Rican currency" (53).

Third. As to the claim of account stated between the parties by which the amount assigned to Mullenhoff and Korber was agreed to be the total amount due from the city at that time, the court charged the jury that if they believed from the testimony—

"that it was understood and agreed by the parties at that time that that was all that was owing up to that time, why then, that cuts off any claim by the Saint John's Gas Company up to that period of time, and any item of this account sued on prior to that time in June would be cut off by that settlement, if there was such a settlement" (54).

By way of recapitulation the court reiterated its instructions upon the above three points in somewhat more terse language (54, 55).

The jury returned a verdict for the plaintiff in "the sum of $8,761.35 in damages," and judgment was entered accordingly (7, 8).

JURISDICTION.

By section 34 of the "Foraker Act" (April 12, 1900) it is provided that the district court of the United States for the district of Porto Rico "shall have, in addition to the ordinary jurisdiction of district courts of the United States, jurisdiction of all cases cognizant in the circuit courts of the United States, and shall proceed therein in the same manner as a circuit court."

By section 35 it is provided:

"That writs of error and appeals from the final decisions of the supreme court of Porto Rico and the district court of the United States shall be allowed and may be taken to the Supreme Court of the United States in the same manner and under the same regulations and in the same cases as from the supreme courts of the Territories of the United States; * * *

By section 3 of the act of March 2, 1901 (31 Stats., 953), the jurisdiction of the district court of the United States for Porto Rico in civil cases was extended so as to embrace controversies "where the parties or either of them are citizens of the United States, or citizens or subjects of a foreign State or States, wherein the matter in dispute exceeds, exclusive of interest or costs, the sum or value of one thousand dollars."

The district court of the United States for the district of Porto Rico is a "territorial" or "colonial" court. As such its jurisdiction is as the Congress of the United States may from time to time, until the island becomes "a part of the United States," declare it to be. The limitations imposed by section 2 of Article III of the Constitution with respect to the

"judicial power" have no application to such courts. Such courts "are legislative courts, created in virtue of the general right of sovereignty which exists in the Government;" the jurisdiction with which they are invested is not a part of the judicial power of the Constitution, but is conferred by Congress, in the exercise of those general powers which that body possesses over the Territories of the United States; and in legislating for them Congress exercises the combined powers of the General and of a State government.

American Ins. Co. *vs.* Canter, 1 Peters, 511.

Benner *vs.* Porter, 9 Howard, 235.

Downes *vs.* Bidwell, 182 U. S., 265 *et seq.*

The Congress having conferred upon the district court of Porto Rico jurisdiction in cases "where the parties or either of them are" * * * "citizens or subjects of a foreign State or States wherein the matter in dispute, exclusive, &c., * * * exceeds the sum or value of one thousand dollars," it is apparent that the district court had jurisdiction of the controversy by reason of the alienage of the plaintiff, the requisite sum or value in dispute appearing.

That this court has jurisdiction to review the judgment of court below on writ of error cannot be doubted.

Hijo *vs.* United States, 194 U. S., 315, 320.

Royal Insurance Co. *vs.* Martin, 192 U. S., 149, 156.

ARGUMENT.

The plaintiff in error complains of the judgment below upon various grounds, which are set forth in fifteen (15) assignments of error.

Of these assignments of error, however, seven (7), being numbered 1, 2, 3, 5, 6, 7, and 14, relate to the single question of the character of the money in which, under the strict terms of the contract itself, payment for services rendered was intended to be made.

Five of the remaining assignments of error, being numbered 8, 10, 11, 12, and 15, present in varying phases the question as to the effect of the acts of the parties in making and receiving payments in a particular medium through a series of years—the defendant below assuming apparently that the evidence disclosed a custom to pay in Porto Rican or provincial money without objection or protest on the part of the plaintiff company.

Two of the remaining assignments of error, being numbered 4 and 9, bear upon the plea of set-off and the refusal of the trial court to admit in evidence a "bill of particulars" offered by the defendant to substantiate such set-off (47–48). No evidence whatever was offered on the part of the defendant to substantiate the contents of said "bill of particulars," and the trial judge excluded it upon that ground alone. Counsel for plaintiff in error at page eleven (11) of his brief waives the 4th assignment of error as being untenable (see 11), but assignment numbered

nine (9) relates to the same subject-matter and is equally untenable, for notwithstanding the witness Egozcue testified that "a general account of the amounts owing to the company, together with the fines that had to be deducted, were shown to Mr. Scott at that time," as stated in the brief of plaintiff in error at page 16, no evidence whatever was offered to prove the account referred to nor the amount of "the fines which had to be deducted," which the account was supposed to contain; nor was there any evidence tending to connect the statement referred to by Egozcue with the "bill of particulars" set forth at page 48 of the record, which, as above stated, was excluded by the court.

It is unnecessary for us to refer to these two assignments of error further.

The sole remaining assignment of error, being numbered 13, relates to the refusal of the trial court to charge the jury with respect to a "compromise" assumed to have been entered into between the plaintiff, acting by its manager, Scott, and the defendant, acting through its mayor, Egozcue. There is no evidence whatever tending to show that such a "compromise" was entered into or was ever contemplated between the parties. The evidence upon which plaintiff in error relies to support such assignment relates to the transaction with Mullenhoff and Korber, which was evidenced by the paper-writing set forth at pages 44 and 45 of the record. So far from amounting to a compromise of a disputed debt or the acceptance by the creditor of the amount mentioned as in full satisfaction of the amount due, the paper itself expressly recites that the amount mentioned should be held as a credit in favor of

Mullenhoff and Korber, the municipal corporation being "therefore" "relieved from any compromise with Mr. Scott concerning said amount, without any prejudice to the resolutions to be passed sometime in the future, about the claims previously filed by the said contractor."

Inasmuch, however, as the parties differed between themselves as to what was the true meaning of the transaction recited in said instrument, and their respective intentions at the time of executing it, and as Egozcue testified that it was intended to evidence a settlement in full to its date, while Scott testified it was merely intended to operate as an assignment of a certain sum to Mullenhoff and Korber, and was not intended to evidence an agreement with Egozcue "that the account as stated by the city of the amount due him was correct" (49), the trial judge left the point to the jury, instructing them that if "it was understood and agreed by the parties at that time (the date of the instrument) that that was all that was owing up to that time, why, then, that cuts off any claim by the Saint John's Gas Company up to that period of time, and any item of this account sued on prior to that time in June would be cut off by that settlement, if there was such a settlement." "If * * * it was merely a transfer of a part of a claim it does not cut off his (its) right to claim anything prior to the month of June. So far as any claim on the part of the defendant for fines and delinquencies in complying with this contract, there is no testimony in reference to them and you can find nothing on that account."

The point appears properly to have been left to the jury. The instruction given concerning it was perspicuous and eminently judicial in tone and character. No exception to

its form was noted by the plaintiff prior to the retirement of the jury; and as the jury must be presumed to have been guided by its letter and spirit in reaching its verdict, there would seem to be no necessity of recurring to the point again in this brief.

If the above points with respect to assignments of error numbered 4, 9, and 13 are well taken, there remains for discussion but the single point as to the medium of payment under the terms of the contract, and as a subordinate element the question as to whether the parties by a course of dealing between themselves subsequent to the date of the contract itself changed its terms with respect to the medium of payment.

Upon the main point the court charged the jury as follows:

"I tell you, as a matter of law, that under the contract the payment for lighting was to be made in the money that was then current and in circulation in the island of Puerto Rico. That was what was meant by 'current foreign money,' when the term was used in that contract. That was what was meant by the term 'current money' in that contract, or even by the term 'currency' in that contract. It was the money that was circulating as money and as the medium of exchange in Puerto Rico at that time and the parties could not have foreseen, for instance, or it is not possible that they would have foreseen, the change of government, or that Puerto Rico for instance, might in the future have belonged to France which may not have had, for instance, a medium of exchange worth more than ten cents in proportion of the money then circulating on the island. If that could be so, then the city of San Juan would have obtained these lights at ten cents each, which, of course, would be very unreasonable.

"The parties making that contract took into consideration the value of money on the island at that time, and the

money that was then circulating in the island. You are to determine what that was from the testimony. If I recollect correctly it was shown in evidence that the money then circulating in the island of Puerto Rico was Spanish gold, American gold, Venezuelan, Mexican, Colombian, Peruvian and Chilean gold, and I believe American silver. There was no showing, as far as I recollect, that pesos, as they are termed, or Puerto Rican money, was circulating in Puerto Rico then. This contract evidently did not mean that the payment was to be made in Spanish gold, because by one of the paragraphs in the contract it was excluded. Therefore, I say to you that under this contract these payments for these lights were to be made in American gold or silver, or in Spanish, Mexican, Colombian, Peruvian, Chilean and Venezuelan gold.

"Now the party could discharge it in any one of these mediums of exchange, and the testimony is before you as to what the money was worth."

As the contract referred to was made in Porto Rico between parties residing in that island and was intended to be and was in fact fully performed within the territorial limits of that island, it is plain that any legal question growing out of it or its terms must be referred for settlement to the law of the place in force at the date of its execution. That law was the Spanish civil law in force in the island of Porto Rico.

By the eighth "Condition," page 20 of the record, it was provided that—

"The payment to the contractor will be made in the circulating foreign money in commerce for the value that is received without any premium that will equalize it to the Spanish official currency."

The last phrase of this "Condition" is evidently the clause of the contract referred to by the learned trial judge

as excluding Spanish currency from the mediums of payment under the contract.

The witness Crósas testified that the foreign money circulating in the island in 1875 was American silver and gold, old Spanish gold, and Mexican and Colombian gold (42); also that "the most of the money in circulation here then" was "American silver and American gold and old Spanish gold doubloons." "The American silver was at par" (43).

In view of these statements, the fact that the price to be paid for the lights was fixed by the advertised "Conditions" in "*dollars*" and the value of the gas-works and buildings, though calculated in "pesetas," was reduced to "dollars" and paid for by the contractor in dollars, and the value of the two houses offered by the contractor as his "guarantee" was also appraised in "dollars," is most significant.

Article 57 of the Commercial Code in force in the island in 1875 provides:

"ART. 57. Commercial contracts shall be executed and complied with in good faith according to the terms in which they were made and drafted without evading the honest, proper, and usual significations of written or spoken words with arbitrary interpretations, nor limiting the effects which are naturally derived from the manner in which the contractors may have explained their wishes and contracted their obligations."

Article 312 of the same Code provides:

"ART. 312. If the loan consist of money, the debtor shall pay it by returning an amount equal to that received, in accordance with the legal value the money may have at the time of the return, unless there was an agreement with regard to the kind of money in which the payment was to be

made, in which case the fluctuations in value shall be lost or taken advantage of by the lender."

It may be remarked in passing that the principles relative to loans is applied throughout Spanish-speaking countries where commercial relations are controlled by code to all transactions relating to the settlement of contractual obligations in money. The principle may be stated thus: Payments must have as a basis the nominal value of the medium of payment on the day when effected or paid, though the legal value of the coin may have changed during the interval which has elapsed between the day on which the obligation was contracted and that on which the payment was made.

The following articles of the Spanish Civil Code in force in Porto Rico furnish further guidance respecting its interpretation and fulfillment.

"ART. 1091. Obligations arising from contracts have legal force between the contracting parties, and must be fulfilled in accordance with their stipulations."

"ART. 1157. A debt shall not be considered as paid until the full amount of the thing has been delivered, or the presentation of which the obligation consisted has been made."

"ART. 1170. Payments of debts of money shall be made in the specie stipulated, and, should it not be possible to deliver the specie, in legal silver or gold coin current in Spain."

"ART. 1258. Contracts are perfected by mere consent, and from that time they are binding, not only with regard to the fulfillment of what has been expressly stipulated, but also with regard to all the consequences, which, according to their character, are in accordance with good faith, use and law."

Article 1170 of the Spanish Civil Code quite nearly corresponds with article 1246 of the French Civil Code, which reads as follows:

"ART. 1246. Si la dette est d'une chose qui ne soit déterminée que par son espèce, le débiteur ne sera pas tenu, pour être libéré, de la donner de la meilleure espèce; mais il ne pourra l'offrir de la plus mauvaise."

Which may reasonably be translated:

ART. 1246. If the debt consists of a thing (or is of a kind) that can only be ascertained in kind, the debtor would not be bound in discharging it to give the best of such kind nor would he be permitted to give the worst.

Having this article as a text, the French commentators have discussed it as follows:

"Lorsque la dette est d'une somme d'argent, le paiement doit être fait en espèces métalliques, d'or ou d'argent, ayant cours en France, á l'époque oú il est effectué; et ce, d'aprés la valeur nominale de ces espèces à cette époque. Il en est ainsi, lors mème que la valeur des monnaies a subi des variations depuis la formation de l'obligation; le débiteur doit toujours, malgré la baisse des monnaies, la somme numérique porté dans l'obligation; et il est, malgré leur hausse, libéré par le paiement de cette somme.

"La règle que le paiements de sommes d'argent doivent être faits d'aprés la valeur nominale des espèces á l'époque oú ils sont effectués étant fondé sur un intérêt d'ordre public, il en resulte que toute convention qui y porte directement ou indirectement atteinte, doit être régardé comme nulle."

Cours de Droit Civil Français, Aubry et Rau, vol. 4, pages 158, 159.

(When the debtconsists of a sum of money (argent) payment must be made in metallic specie—gold or silver—having currency in France at the time at which it (the debt) was incurred, and this according to the nominal value of such specie at such time; and this must be done even though the value of the money (coin) may have suffered variations since the obligation was contracted. It is the

debtor's right always, in spite of the depreciated value of the coins, (to tender) the numercial amount mentioned in the contract, and he is, in spite of its appreciated value, discharged by the payment of the same sum.

The rule that the payments of sums of money must be made according to the nominal value of the "kind" at the time the debt was contracted is in the interest of public order, and consequently every convention (agreement) which tends, either directly or indirectly, to overthrow it should be regarded as void.)

"Si l'obligation a pour objet une somme d'argent due *in genere*, le paiement doit être fait en espèces métalliques d'or ou d'argent ayant cours en France, d'aprés la valeur nominale de ces espèces au moment du payement et sans tenir compte des variations subies par les monnaies dans l'intervalle de l'obligation au payement. Si, par exemple, une loi nouvelle venait à réduirè a 4 fr. 75c. la valeur de la pièce de 5 francs, le déditeur qui, sous l'empire de l'ancienne loi, aurait emprunté 1,000 francs en pièces de 5 francs, devrait payer 210 pièces de 4 fr. 75c., plus 2 fr. 50c."

Répétitions écrites sur le Code Civil by Frédéric Mourlon., volume 2, page 749.

(If the obligation has as object a sum of money due *in genere*, the payment must be made in metallic species (coin) of gold or silver having legal currency in France, according to the nominal value of those species (coins) at the time at which the payment is effected, and without taking account of the variations suffered by the coin during the interval which has elapsed between the obligation and the payment. If, for instance, a new law ordered a reduction on the value of the 5-franc piece, viz., 4 fr. 75c., a debtor borrowing 1,000 francs under the ancient law in pieces of 5 francs must pay 210 pieces of 4 fr. 75c. and 2 fr. 50c. more.)

"Les paiements doivent avoir pour base la valeur nominale des espèces au moment oú ils sont effectués, quand méme la valeur légale des monnaies aurait changé entre le jour de la naissance de l'obligation et celui du paiement."

Commentaire Théorique et Pratique du Code Civil par Théophile Huc, volume 8, page 62.

(Payments must have as a basis the nominal value of the species at the moment at which they are effected, although the legal value of the coin may have changed between the day on which the obligation arose and the day of the payment.)

To like effect also is the comment in Précis de Droit Civil, par G. Baudry-Lecautinerie, vol. 2, p. 748.

The opinions and sentences of Spanish jurists are to like effect, as plainly appears from the various references thereto under article 57 of the Code of Commerce in force in Porto Rico, page 24 of the War Department translation (Government Printing Office, 1899).

And so also is the prevailing law of the United States as settled by this court.

Butler *vs.* Harwitz, 7 Wallace, 258.
Willard *vs.* Tayloe, 8 Wallace, 557, 574.
Treblicock *vs.* Wilson, 12 Wallace, 687.

And it is well settled that a contract made abroad to pay in "dollars," where performance is contemplated in an American port, is payable in "currency of the United States." Trecartin *vs.* The Rochambeau, 2 Clifford's Reports, 465 (Fed. Cas. 14,163); The *Quintero*, 1 Lowell, 38 (Fed Cas. 11,517). And so a bond given in 1859, payable in "dollars," was held to be payable in gold and silver only. Williamson *vs.* Richardson, Fed. Cas. 17,754.

The same rule has been upheld, in the absence of statutory provisions, by most, if not all, of the States of the United States. (See title "Payment," American Digest, Century edition, vol. 39, p. 54 *et seq.*)

It would seem, therefore, that the trial judge in charging the jury, as above set forth, with respect to the law of the

contract, in so far as payment under its express terms was concerned, was entirely correct, and that no error was committed by him either in permitting the witness Crosas to testify as to the kinds of foreign money current in Porto Rico at the date of the contract, or in refusing to permit the same witness to reply to the questions set forth in assignments of error 2 and 3, nor with respect to the language employed in his charge and excepted to under assignments of error 5, 6, and 7, nor in refusing to charge the jury as set forth in assignment of error 14.

This leaves for discussion the single question whether the parties, by a course of conduct continued through a period of years and acquiesced in by both, effected in fact a change in the terms of the contract, or, as was said by the trial judge, whether the parties, by a continued course of action, agreed "that this contract, from that time on, was payable in Porto Rican currency, or pesos. In other words, it is claimed that that written contract was changed by such verbal agreements, or different course of action—of mutual conduct."

* * *

Upon this point the testimony was as follows:

The witness Scott, on cross-examination, testified (p. 40) that from 1890 to the expiration of the contract he had "collected from the city all the moneys that the city has paid."

"Q. They paid all that was due up to the date of your bill of particulars?

"A. They never paid what was due; they always paid in Mexican money or pesos, and under verbal protest from me.

"Q. And you accepted that?

"A. I could not get anything else.

* * * * * * *

"Q. I will ask you to state whether or not about the 22d day of June, 1900, you had a settlement with the city as to the amount then due.

"A. No, I never had any settlement whatever.

* * * * * * *

"Q. Then, as I understand it, from the year 1900 you received and accepted payments from the city?

"A. As in gold.

"Q. (continued). In Porto Rican pesos because you could not get anything else?

(41.) "A. I did not; I accepted in gold; all the payments were made in American gold.

"Q. But the amounts were the amounts calculated in Porto Rican pesos?

"A. That I do not know."

"Re-direct examination" (p. 42):

"Q. In what kind of money did you receive the several payments made by the city?

"A. In American money.

"Q. Were these amounts in full of the amounts the city owed you?

"A. Certainly not; very far from it."

The witness Egozcue testified (p. 44) that he became mayor of the city of San Juan in 1900, since which time he has been continuously mayor with the exception of four months when he was a member of the legislature, the treasurer of the city by order of the mayor made the payments to Mr. Scott on behalf of the city on that contract; * * * "while the current provincial money was in existence these payments to the plaintiff company were made in that money, and from the conversion of the money into gold he was paid the amount in gold that was corresponding to it at the official rate established by the Government; previous to the change of the money Mr. Scott received no other than provincial money *at no time while I have been mayor;* neither did Mr. Scott ever make any objection to the receipt of the provincial money."

This was all of the testimony offered on the trial with respect to medium in which payments had been made, and it is apparent that the statements of the witnesses were conflicting. In this aspect of the matter the court left the question of fact to the determination of the jury, charging that body as follows (p. 53):

"* * * and I say to you that if the one had paid and the other without objection, had accepted through a course of years money of a certain kind and meant as payment of what was owing on this contract from time to time, then you may find that the parties had changed the kind of money with which the contract might be discharged, and if this was in Porto Rican pesos then the plaintiff would be only entitled to recover in American dollars, at the rate of sixty cents on the American dollar, whatever amount you may believe from the evidence he is entitled to recover—that is, if their minds met upon this subject.

"* * * If their minds met and the money was paid by the one and received by the other without protest, then that would have made a change in the kind of money the contract was to be discharged in. If the city of San Juan owed the plaintiff a certain amount for lighting and the city of San Juan offered to pay so much money, and, at the same time said to the debtor (creditor) 'I dispute your claim; this is all that I will pay on it, and you must accept this or have nothing,' and then the debtor (creditor) accepted it, it would be a settlement; but if the city of San Juan merely paid a certain amount to the debtor and the debtor protested at the time that it was not as much as he was entitled to, that would reserve his rights in the matter and he would be entitled to receive and credit that amount on the claim and then sue for the balance of it afterwards" (54).

This charge was a full and exact exposition of the controversy between the parties as it appeared from the evidence, and was certainly as favorable to the defendant as it could demand or expect.

Counsel for the plaintiff in error in arguing the exception and assignment of error covering this portion of the court's charge seems to proceed upon the assumption that the evidence was all one way, and apparently loses sight of the fact that by reason of the direct conflict in the statements of the only two witnesses who testified on the subject, the determination of the truth as to the fact was necessarily left to the jury for its decision. Neither the reference to the American and English Encyclopedia nor to the case of *Savage vs. U. S.*, 92 U. S., 382, are in point for reasons which plainly appear from a cursory inspection of the quotations themselves.

The court was clearly right in its refusal to instruct the jury in the terms set forth in assignments of error 10 and 11, for such prayers were defective in not including the very important element as to the receipt by the plaintiff of payments in depreciated currency *under protest*. I twould have been manifestly unfair and erroneous for the court to have charged the jury that the mere fact of acceptance of payment by the plaintiff in money of a certain kind and value was to be taken as cogent evidence of the meaning of the phrase "current money" appearing in the contract as understood by the parties irrespective of whether the creditor protested or not.

It was not error on the part of the court to refuse the prayers for instruction set up in assignments 12 and 15, because the very matters covered thereby had already been covered by the court in its general charge, and it is well established that no party to the cause has a right to insist upon

the trial judge charging the jury in specific words if the matter be otherwise fully taken care of.

Upon the whole case it is submitted that the judgment of the district court of the United States for the district of Puerto Rico should be affirmed with costs.

FRANCIS H. DEXTER,
FREDERIC D. MCKENNEY,
JOHN SPALDING FLANNERY,
Attorneys for the Defendant in Error.